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No. 84-928

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

ABBEY NURSING HOME, INC.,
AND MAX A. STRAUSS,

PETITIONERS

-vs-

ESTATE OF ALMA RICHARDSON,
VERNEDA BENTLEY, ADMINISTRATRIX,

RESPONDENT

ON WRIT OF CERTIORARI
TO THE OHIO EIGHT DISTRICT
COURT OF APPEALS

PETITIONER'S REPLY BRIEF AND SUPPLEMENTAL APPENDIX

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REPLY

A. Is it a violation of Article VI, Cl. 2, the "Supremacy Clause" of the Constitution of the United States, for a state, through its courts, to refuse to enforce Federal statutory law, specifically the subrogation provisions of 42 U.S.C. §1396a(a)(25)(C), found in Title XIX of the Social Security Act, by refusing to give effect to the state statute carrying out the requirements of Federal law, in this case O.R.C. §5101.58?

In her argument in opposition to certiorari, respondent concedes the validity of the constitutional issue raised therein. She only challenges the underlying factual basis for the reason for granting the writ by stating, at p. 10 of her brief:

> Petitioners argument and alleged violation of the Supremacy Clause is totally without merit. The alleged right of subrogation referred to by petitioners does not apply in this action because **respondent did not seek to recover any money paid to Abbey Nursing Home by either the Ohio or Cuyahoga County Welfare Departments.** [Emphasis in the original.]

The foregoing is an incorrect statement of the issue raised by petitioners for two reasons. **First**, petitioners asserted, at pp. 8 and 22 of their Petition, that 42 U.S.C. §1396a(a)(25)(C) and O.R.C. §5101.58 were violated because Medicaid funds paid for certain health care expenses allegedly necessitated by her decedent's claimed injuries, which respondent included in her claim for recovery. While respondent may not have sought recovery for Medicaid funds paid to petitioner Abbey Nursing Home, she **did** seek damages for expenses paid in **her** behalf by Medicaid.

Second, the record in this case establishes the foregoing facts through respondent's **own admission** on direct testimony at the first trial of this

action. (**See**, testimony of Verneda Bentley on direct examination, at pp. 890-891 and 893-896 of the Transcript of Proceedings of the First Trial herein, reproduced in the Appendix hereto at pp. 15 to 20.) Thus, the facts in this case do demonstrate that the courts of Ohio have failed to enforce the applicable subrogation provisions of 42 U.S.C. §1396a(a)(25) and O.R.C. §5101.58, thereby prejudicing petitioners by exposing them to the risk of double recovery against them for the amount paid by Medicaid.

B. Is it a violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and, therefore, a denial of Due Process and of Equal Protection of the laws for the courts of a state, in a civil case, to deny a party thereto the benefit of those well-settled statutory and common law rules

governing substantive proof and trial procedure which are ordinarily and regularly applied in similar disputes before such courts?

Again, respondent raises no opposition to petitioners' central constitutional issue that the denial to a party, in a civil action in a state court, of the benefit of well-settled statutory and common law rules governing proof and procedure, constitutes a violation of the Due Process and Equal Protection guarantees of the Fourteenth Amendment. Rather, respondent's opposition is an attempt to rebut five out of the eight deprivations so listed on pp. 32-33 of the Petition. If the courts of Ohio did, in fact, deprive petitioners of their right to have their case tried under the same rules as all other litigants, then the validity of this reason for granting the writ is also conceded by respondent. And, in fact, petitioners were deprived of the benefits of those rules.

Respondent, at p. 11 of her brief, suggests that no error occurred as a result of the trial court's refusal to permit a verbatim stenographic record to be made of all of the trial proceedings, thus depriving petitioners of their right to obtain effective appellate review. Respondent predicates this contention upon Ohio App. R. 9, as allegedly interpreted by the Ohio Supreme Court in **Knapp v. Edwards Laboratories**, 61 Ohio St. 2d 197 (1980). That case, however, is no authority for the rule which respondent insists is the correct one. Rather, **Knapp** involves a bizarre fact pattern, wherein the trial court permitted a full verbatim stenographic record to be made but, after the trial, a combination of the illness of the court reporter and the mental instability of the trial judge [which led to his removal from the bench -- **see, Ohio State Bar Ass'n. v. Mayer**, 54 Ohio St. 2d 431 (1978)], prevented a **transcription** of that record which was, in fact, made.

The rule in Ohio is set forth in a statute, R.C. §2301.20, which provides:

> Upon the trial of a case in the court of common pleas, if either party to the suit, or his attorney, requests the services of a shorthand reporter, the trial judge shall grant the request, or such judge may order a full report of the testimony or other proceedings, in which case such shorthand reporter shall take accurate shorthand notes of the oral testimony or other oral proceedings, which notes shall be filed in the office of the official shorthand reporter and carefully preserved.

This statute has repeatedly been held by the courts of Ohio to require that a stenographic record of **all** trial proceedings be afforded to a party where, as here, it has been timely requested. **White v. White**, 50 Ohio App. 2d 263, 268-269 (Cuyahoga 1977); **Combs v. Cardwell**, 472 F. 2d 1188, 68 Ohio Ops. 2d 243 (6th Cir. 1972); **University Hts. v. Dachman**, 33 Ohio App. 2d 314, 316 (Cuyahoga 1973); **State v. Mishne**, 93 Ohio L. Abs. 85, 92 (Geauga App. 1963). Petitioners herein were clearly deprived of this right.

Respondent insists, at pp. 12-13 of her brief, that Ohio law does not require expert proof — in a case involving allegations that a nursing home, acting through its staff of licensed administrators, licensed nurses, and nurses' aides and orderlies, was negligent in the discharge of its duties toward respondent's decedent -- of (a) the standard of care; (b) that the conduct of the health-care staff involved fell below that standard; and (c) that the claimed injuries of decedent were proximately caused by that breach. The law in Ohio, and as set down by this Court, is, of course, that such expert testimony is both required and permitted. **Bruni v. Tatsumi**, 46 Ohio St. 2d 127 (1976); **Ragone v. Vitali and Beltrami, Jr., Inc.**, 42 Ohio St. 2d 161, 173-174 (1975); **McKay Machine Co. v. Rodman**, 11 Ohio St. 2d 77 (1967); **McCrory v. State**, 67 Ohio St. 2d 99, 103 (1981); **Willett v. Rowekamp**, 134 Ohio St. 285 (1938); **Fleischmann Transportation Co. v. Bishop**, 12 Ohio App. 293, 294 (Hamilton 1919);

and **Youngberg v. Romeo**, 457 U.S. 307, 321-323 (1982).

Respondent then denies, at p. 13, that petitioners possessed the right to present evidence of one of their employee's reputation for peace and good order, after it was alleged that she assaulted respondent's decedent while in the course and scope of her employment, and, consequently, no deprivation of the right to present such evidence occurred. The rule in Ohio is that such evidence is admissible. **Lakes v. Buckeye Mutual Ins. Assn.**, 110 Ohio App. 115, 118 (Jackson 1959). Petitioners were, therefore, deprived of the benefit of the rule.

The next rule of law which respondent denies is in existence in Ohio, is one requiring expert testimony to establish negligence of the nursing home staff in the discharge of their various duties to her decedent and to proximately link this alleged negligence to said decedent's claimed damages. As shown above, this rule does exist, and

has existed since at least 1919. **Bruni; Ragone; McKay Machine Co.; McCrory; Willett; Fleischmann; Youngberg, all supra.**

Finally, respondent denies that petitioners were denied a charge to the jury on the issue of punitive damages that correctly incorporates Ohio law on the subject. The law in Ohio **is** that, in order to be held liable in punitive damages, a defendant's conduct must be proven to have been intentional and deliberate, or have the character of outrage frequently associated with crime. **Detling v. Chockley,** 70 Ohio St. 2d 134, 137-138 (1982). A review of the jury charge (which appears in the Appendix to the Petition in Exhibit E at the discussion of Assignment of Error No. XXXII), reveals that this rule was **not** applied in that charge. Therefore, petitioners were, in fact, deprived of the benefit and protection of the law by the courts of Ohio in this regard.

The remaining assertions of deprivation by petitioners, as well as the other such assertions raised below (**see** Appendix to the Petition, Exhibit E at the "Appendix to Case No. 46126"), were not contested by respondent. When viewed together, the pervasive and wholesale denial of Due Process of Law and the Equal Protection of the laws by the courts of Ohio becomes apparent. This reason, too, for granting **certiorari** is therefore well-taken.

C. Where this Court has decided that in cases seeking redress for alleged violations of an individual's liberty interest in safety in an institution supported by Federal funds, a decision regarding such safety, if made by a professional (which includes a person competent, whether by education, training or experience, to make the particular decision at issue) is presumptively valid, and liability may be imposed only when the decision by the professional is such a substantial departure

from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment, may a state court impose such liability without first requiring proof of (a) the accepted professional judgment, practice, or standard, and (b) the departure therefrom?

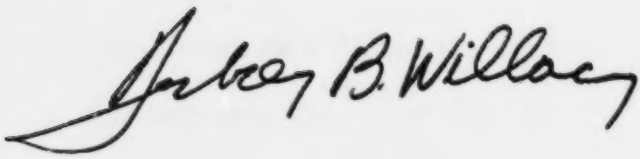
The cases cited by respondent at pp. 16-18 of her brief all predate this Court's 1982 decision in **Youngberg v. Romeo, supra.** Regardless of what the rule of law may have been as to the type and quantum of proof necessary to establish liability on the part of professional decision-makers (i.e., administrators, nurses, therapists, aides, etc.) in government-supported custodial care facilities, this Court has now determined that such persons are presumed to have acted validly until proof of a substantial departure from accepted professional

judgment (**i.e.**, expert testimony as to what "accepted professional judgment" is, and that the petitioners' judgment substantially departed therefrom) is adduced. Such standard is denied by respondent and, in fact, was not applied by the courts below, thus necessitating issuance of the requested writ of **certiorari** to insure uniformity of decisions on this Federal question.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in support of the Petition for **Certiorari**, petitioners respectfully request that the Writ of **Certiorari** prayed for be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Aubrey B. Willacy, Counsel for Petitioners, Abbey Nursing Home, Inc., and Max Strauss, and a member of the Bar of the Supreme Court of the United States, certify that on January 24th, 1985, I served three (3) copies of the foregoing Petitioners' Reply Brief and Supplemental Appendix on Counsel for Respondent, Nicholas M. DeVito, Esq., Nicholas M. DeVito & Associates, 1000 Terminal Tower, Cleveland, Ohio 44113.

Aubrey B. Willacy

Aubrey B. Willacy, Esq.

TRANSCRIPT OF RECORD OF FIRST TRIAL
IN COURT OF COMMON PLEAS, CASE NO. 988159,
CONTAINING THE DIRECT TESTIMONY OF
PLAINTIFF, VERNEDA BENTLEY

* * *

Q. Why don't you tell us what you had to do for her?

A. Starting from June 19, which was June 20th, I called Seeley Medical Company. I think this was the one company's name, and I informed them of the situation and I asked for a hospital bed, a hoyle lift, a lifter. That's what they used to be able to move her because she was heavy, and pottychairs, tables, medical tables, and I had an electric pump that ran 24 hours a day for her air mattress, and electric air mattress, sheepskin, clothes, gowns, because when I got her, all her gowns and everything had been —

MR. WILLACY: Objection.

A. — left.

THE COURT: Sustained.

A. — at the nursing home. She had to have -- I had to buy all white linens for the hospital bed because all her stuff had to be bleached and disinfected. I had to have the room painted. The carpet was taken out, a tile floor installed in order to keep the place clean. Oh, boy. So many things. I had to buy pads, chuck pads that we bought by the cases.

Q. Did she have to have a special kind of diet?

A. Everything, yes, I had to buy for her diet, everything was no salt. I had to get a blender because everything had to be blended.

Q. How about her food?

A. Yes. I purchased all her food, even when she went on an all liquid diet the last month, everything. I took care of all, everything.

Q. How long did your grandmother live with you in your home?

A. From June 21st of 1978 until April 1.

Q. Of what year?

A. Of 1979.

Q. Is that when she died?

A. Yes, at my home.

* * *

Q. What else did you have to get for your grandmother's care?

A. With that Ensure, I had to have a feeding tube and a syringe and the food was pumped into her through her nose. The hospital put in a special tube that was from her, from her nose down into her stomach, and I had to inject food. That was her food that had to be injected through her nose to her stomach.

MR. WILLACY: Move to strike, your Honor.

THE COURT: Overruled.

Q. Now, each time she went for a hospital visit, I think you testified she had to go by ambulance.

A. Yes.

Q. Do you know how much that cost?

A. $100 —

MR. WILLACY: Objection, your Honor.

THE COURT: She may answer.

A. $100 a trip.

Q. Do you know how many trips were made to the hospital?

A. Many trips.

Q. Many trips?

A. Many trips.

Q. And was it for the treatment of these particular injuries that we have been talking about that were in the pictures?

MR. WILLACY: Objection, your Honor.

THE COURT: Sustained.

Q. What were the treatments for?

MR. WILLACY: Objection.

THE COURT: She may answer.

A. For the treatment of those injuries and also her previous injuries.

Q. Who is your oldest daughter, Verneda?

A. Trava.

Q. How old is Trava?

A. She just turned 13, just turned 13 February 3rd.

Q. Did Trava visit her great-grandmother with you on several occasions at the nursing home?

A. Yes, on the average of four, five times a week, three or four, five times a week.

Q. And did Trava also help you in caring for your grandmother when she was in your home?

A. Yes, she did.

Q. What did Trava do?

A. Trava did — she helped clean her. She helped change her. She helped bathe her. She combed her hair. She helped clean up her room. She helped wash. She did everything from changing, turning her over in bed, to cleaning her, to everything, everything that I did.

Q. She helped feed her?

A. Yes, she did.

Q. What did the visiting nurse do when she came?

A. She would take her blood pressure and take her blood pressure, taking her blood pressure and her temperature.

Q. Was there any discussion from her about putting Alma in a nursing home?

MR. WILLACY: Objection

THE COURT: Sustained.

Q. Did Alma want to go back to a nursing home?

MR. WILLACY: Objection.

THE COURT: Sustained.

Q. Who paid for these trips and this Seeley equipment, the supplies? Who took care of that? Did you?

A. Yes, I did. I made the arrangements for everything to be taken care of.

Q. And everything that was necessary for your grandmother, you paid for it?

A. Yes, along with her Medicare, Medicaid, whatever.

* * *

p. 8806